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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/627,355	07/28/2000	Bob L. Mackey	CDST-F102	3572

7590

07/23/2002

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EXAMINER

DAY, MICHAEL HENRY

ART UNIT

PAPER NUMBER

2879

DATE MAILED: 07/23/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action**

Application No.

09/627,355

Applicant(s)

B. Mackey, et al.

Examiner

Michael Day

Art Unit

2879

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED Jun 18, 2002 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

Therefore, further action by the applicant is required to avoid the abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

THE PERIOD FOR REPLY [check only a) or b)]

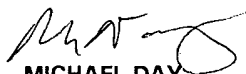
- a) ☒ The period for reply expires three months from the mailing date of the final rejection.
- b) ☐ In view of the early submission of the proposed reply (within two months as set forth in MPEP § 706.07 (f)), the period for reply expires on the mailing date of this Advisory Action, OR continues to run from the mailing date of the final rejection, whichever is later. In no event, however, will the statutory period for the reply expire later than SIX MONTHS from the mailing date of the final rejection.

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will be entered upon the timely submission of a Notice of Appeal and Appeal Brief with requisite fees.
3. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search. (See NOTE below);
- (b) ☐ they raise the issue of new matter. (See NOTE below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without cancelling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_

4. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_
5. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment cancelling the non-allowable claim(s).
6. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: substantially for reasons of record. See attached Supplemental to Advisory Action.
7. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
8. ☒ For purposes of Appeal, the status of the claim(s) is as follows (see attached written explanation, if any):
- Claim(s) allowed: \_\_\_\_\_
- Claim(s) objected to: \_\_\_\_\_
- Claim(s) rejected: 1-38
9. ☐ The proposed drawing correction filed on \_\_\_\_\_ a) ☐ has b) ☐ has not been approved by the Examiner.
10. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_
11. ☐ Other: \_\_\_\_\_

  
MICHAEL DAY  
PRIMARY EXAMINER  
ART UNIT 2879

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**ADVISORY ACTION (SUPPLEMENTAL)**

1. The response, filed 18 June 2002, has been entered.
2. Referring to the second full paragraph of page 2 of the response, filed 18 June 2002, the applicant alleges that the conductive regions 28 is not continuous and therefore does not function as a barrier layer that prevents penetration by electrons. The examiner respectfully disagrees. The subject argument is not commensurate with the scope of the claims 1, and 19. Nowhere in claims 1, and 19 is the term "continuous" found. Consequently, the conductive layer 28 is sufficient in and of itself to met the subject claim limitation. Furthermore, even if a continuous layer were claimed, the silica layer 34 would appear from all evidence to be sufficient to prevents penetration by at least some, if not all, of the electrons. It is noted that the instant specification provides a dearth of guidance as to the requisite thickness for the specified materials, and the applicant has provided no evidence to support the allegation of lack of functionality.

Furthermore, in view of the structural similarity between applicants' disclosed apparatus (see page 38, lines 4-15) and the apparatus of Wallace et al. '151, it was proper to assume that the prior art structure inherently possesses the functionally defined limitation of applicants' claimed apparatus. Upon the examiner's determination that the prior art structure met the functional limitation of the claim, the burden shifted to applicants to show that the prior art structure did not do so. See *In re Schreiber*, 128 F.3d 1473, 1478, 44 USPQ2d 1429, 1432 (Fed. Cir. 1997); *In re King*, 801 F.2d 1324, 1327, 231 USPQ 136, 138-39 (Fed. Cir. 1986); *In re Best*,

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562 F.2d 1252, 1254-55, 195 USPQ 430, 433 (CCPA 1976); In re Ludtke, 441 F.2d 660, 664, 169 USPQ 563, 566-67 (CCPA 1971). It is noted that the applicants neither explain nor provide evidence, how the Wallace et al. '151 conductive regions 28 and/or silica layer 34 would fail to prevent penetration by at least some, if not all, of the electrons.

Referring to the second full paragraph of page 5 of the response, the applicant alleges that the silica layer 24 is not in the path of the electron, and consequently would not form a barrier layer to prevent penetration by electrons. The examiner is confused by this argument, and notes that the applicant's FIG. 10, similarly includes a barrier layer 1002 disposed between the substrate 1001, and conductive layer (not numbered). Consequently, it would appear that the applicant is arguing that in effect the instantly disclosed and claimed invention is inoperative, and should be rejected under the first paragraph of 35 USC 112. The examiner respectfully disagrees. The fact that the silica layer 24 is not in the path of the electron does not alter the fact that the silica layer 24 would form a barrier layer to prevent penetration by electrons. Rather, the fact that the silica layer 24 is not in the path of the electron merely reduces the thickness requirement for the barrier layer in order to prevent penetration by electrons.

In conclusion, the fact that the applicant alleges to have discovered a further advantage or utility of structure disclosed by the prior art does not render the prior art structure patentable to them. It is the position of the examiner that the presently claimed subject matter of claims 1-9, 19, 20, 22-29, and 10-14, 16-19, 21-25, 27-29, read on the prior art structure as evidenced by the prior art meeting all of the claimed structural limitation.

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***Conclusion***

3. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Day whose telephone number is 703/305-4941. The examiner can normally be reached on Monday-Friday, from 8:00 A.M. to 5:00 P.M.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nimeshkumar Patel, can be reached by phoning 703/305-4794. The Fax phone number is 703/308-7382.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is 703/308-0956.

July 17, 2002

A handwritten signature in black ink, appearing to read 'M. Day', with a long horizontal flourish extending to the right.

**MICHAEL DAY  
PRIMARY EXAMINER  
GROUP 2870**